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Frank J Viola

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EXAMINER

LOPEZ, MICHELLE

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANK J. VIOLA

Appeal 2009-002711
Application 10/529,568
Technology Center 3700

Decided: ¹ June 24, 2009

Before WILLIAM F. PATE, III, JENNIFER D. BAHR, and
STEFAN STAICOVICI, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

STATEMENT OF THE CASE

Frank J. Viola (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 17-27 and 37. Claims 38-40 have been withdrawn and claims 1-16 and 28-36 have been canceled. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

THE INVENTION

The Appellant's invention is drawn towards a tool assembly 10 for a surgical stapling device including a pair of jaws having an anvil 12, a cartridge assembly 14, and an approximation member 16. Specification 6, ll. 16-19 and fig. 1.

Claim 17 is representative of the claimed invention and reads as follows:

17. A tool assembly comprising:
- a pair of jaws including a first jaw and a second jaw, each of the jaws having a proximal end and a distal end, the first and second jaws being movable in relation to the other;
 - first and second cam followers supported on the first jaw; and
 - an approximation member including at least one cam surface positioned to engage the first and second cam followers, the approximation member being movable through an actuating stroke to move the at least one cam surface in relation to the first and second cam followers;
- wherein the approximation member is movable to move the at least one cam surface in relation to the first and second cam followers to effect movement of the first jaw to approximate a distal end of the first jaw with the

second jaw in a first portion of the actuating stroke, to subsequently move the distal end of the first jaw away from the second jaw in a second portion of the actuating stroke, and to subsequently bring together the first jaw and the second jaw in substantially parallel closure in a third portion of the actuating stroke.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Plyley	US 5,816,471	Oct. 6, 1998
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The Appellant seeks review of the Examiner's rejection of claims 17-27 and 37 under 35 U.S.C. § 102(b) as anticipated by Plyley.

THE ISSUE

Has the Appellant demonstrated that the Examiner erred in determining that the first and second jaws of the tool of Plyley effectuate: (a) a first movement of the first jaw to approximate a distal end of the first jaw with the second jaw; (b) a *subsequent* second movement of the distal end of the first jaw away from the second jaw; and (c) a third *subsequent* movement in which the first jaw and the second jaw are brought together in a “substantially parallel closure”?

SUMMARY OF DECISION

We REVERSE.

FINDINGS OF FACT

The following enumerated findings of facts (FF) are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. Plyley teaches a surgical stapler 10 including a handle portion 12 adapted to be grasped by a surgeon, an anvil retention portion 16 (first jaw), and a cartridge retention portion 14 (second jaw). Plyley, col. 10, ll. 50-54 and fig. 1.
2. Figures 1-3 of Plyley teach that the anvil retention portion 16 (first jaw) moves from an open position (fig. 1) to a partially closed position (fig. 2), and finally to a closed position. Plyley, col. 12, l. 65 through col. 13, l. 1.
3. Plyley further teaches that the movement of the anvil portion 16 from the open position (fig. 1) to the closed position (fig. 3) constitutes a “tip to tail” closure. Plyley, col. 13, ll. 53-55.
4. In a “tip to tail” closure the leading portion 71 of the anvil moves toward the closed position faster than the trailing portion 73, and then the relative speeds of closure of the leading and the trailing portions are reversed. As such, the leading portion 71 reaches a fully closed position prior to the trailing edge 73. Plyley, col. 13, ll. 55-60

PRINCIPLES OF LAW

Anticipation

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros, Inc. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987).

OPINION

Independent claim 17 requires a tool assembly having a first jaw and a second jaw that can be brought together according to a specific *sequence* of movement. That is, claim 17 requires: (a) a first movement of the first jaw to approximate a distal end of the first jaw with the second jaw; (b) a *subsequent* second movement of the distal end of the first jaw away from the second jaw; and finally, (c) a third *subsequent* movement in which the first jaw and the second jaw are brought together in a "substantially parallel closure."

The Appellant argues that in the tool of Plyley the distal end of the first jaw does not move away from the second jaw. Rather, the Appellant argues that the distal portion 71 of the anvil retention portion 16 (first jaw) of Plyley moves *continuously toward* the cartridge (second jaw). App. Br. 8. In response, the Examiner finds that Plyley suggests movement of the first jaw so as to:

- 1) [A]pproximate a distal end of the first jaw with the second jaw as shown in fig. 2, 2) move the distal end of the first jaw away from the second jaw as shown in fig. 1, and 3) bring together the first and the second jaw as shown in fig. 3.

Ans. 4.

The Examiner further finds that, because a surgeon manually operates the tool of Plyley, the tool of Plyley has the capability to be operated in a *desired sequence*, such as:

[T]o approximate the distal ends of the jaws in a first portion of the actuating stroke, to [separate] said distal ends in a second portion of the actuating stroke, and to bring the jaws together in a final portion of the actuating stroke.

Id.

As noted above, Plyley teaches a surgical stapler 10 including a handle portion 12 adapted to be grasped by a surgeon, an anvil retention portion 16 (first jaw), and a cartridge retention portion 14 (second jaw). FF 1. Figures 1-3 of Plyley teach that the anvil retention portion 16 (first jaw) moves from an open position (fig. 1) to a partially closed position (fig. 2), and finally to a closed position. FF 2. As such, we find that the anvil retention portion 16 (first jaw) of Plyley moves *continuously toward* the cartridge retention portion 14 (second jaw). Hence, the distal end of the first jaw (anvil retention portion 16) of Plyley does not move away from the second jaw (cartridge retention portion 14), as required by claim 17.

However, even adopting the Examiner's suggestion that the tool of Plyley may be operated in any desired sequence² (*see* Ans. 4), we find that the first and second jaws of the tool of Plyley are not brought together in "substantially parallel closure," as required by claim 17. As noted above,

² In order to match the Appellant's claimed movement sequence, the anvil retention portion 16 (first jaw) of Plyley would have to move from a partially closed position (fig. 2) to an open position (fig. 1), to a partially closed position once more (fig. 2), and finally to a closed position (fig. 3).

Plyley teaches that the movement of the anvil portion 16 from the “open position” (fig. 1) to the “closed position” (fig. 3) constitutes a “tip to tail” closure. FF 3. That is, the leading portion 71 of the anvil moves toward the closed position faster than the trailing portion 73, and then the relative speeds of closure of the leading and the trailing portions are reversed. As such, Plyley teaches that the leading portion 71 reaches a fully closed position prior to the trailing edge 73. FF 4. Hence, because the leading and the trailing portions of the anvil retention portion 16 (first jaw) have different closure velocities, we find that the anvil retention portion (first jaw) and the cartridge retention portion (first jaw) of Plyley define an acute angle and cannot be brought together in a parallel manner. As such, we agree with the Appellant that the anvil retention portion 16 (first jaw) and the cartridge retention portion 14 (second jaw) of Plyley “are never brought together ‘in substantially parallel closure’ as recited in claim 17.” Reply Br. 3.

Inasmuch as we found that Plyley does not teach a tool assembly having first and second jaws, which are brought together “in [a] substantially parallel closure” according to the claimed *sequence* of movement, Plyley does not teach all the elements of independent claim 17. Accordingly, the rejection of claims 17-27 and 37 under 35 U.S.C. § 102(b) as anticipated by Plyley cannot be sustained.

CONCLUSION

The Appellant has shown that the Examiner erred in determining that the first and second jaws of the tool of Plyley effectuate: (a) a first movement of the first jaw to approximate a distal end of the first jaw with the second jaw; (b) a *subsequent* second movement of the distal end of the

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first jaw away from the second jaw; and (c) a third *subsequent* movement in which the first jaw and the second jaw are brought together in a “substantially parallel closure.”

DECISION

The Examiner’s rejection of claims 17-27 and 37 is reversed.

REVERSED

mls

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